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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 555

BRISTOL HACKBUSCH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONER IN REPLY TO BRIEF OF THE UNITED STATES.

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INDEX.

PAGE

The Government's Summary of the evidence against petitioner, Hackbusch 1

Answer to argument appearing in Government's Brief:

1. The conviction of the petitioner is not supported by any evidence 6
2. Judge Walter C. Lindley was disqualified to act as Judge of the Circuit Court of Appeals .. 11
3. The trial court coerced the jury 14

Citations.

Kern v. U. S., 158 Fed. 2d 568 (C. C. A. 9) 9

Ray v. U. S., 114 Fed. 2d 508 (C. C. A. 8) (1940) 6, 7

30 American Jurisprudence, p. 790, Section 83 12

Statute.

Sec. 120 of Judicial Code of the U. S., as amended, Title 28, Sec. 216, U. S. C. A. 12

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THE GOVERNMENT'S SUMMARY OF THE EVIDENCE AGAINST PETITIONER HACKBUSCH.

The Government in its brief summarized the evidence against the petitioner herein on pages 9 to 11. An analysis of this summary is in order.

"Perry met Hackbusch about the middle of 1942, and occasionally made small loans to him."

This is no proof of the conspiracy charged in the indictment.

"Hackbusch had an account in the bank in his name as trustee."

This was perfectly legitimate and does not serve to prove any charge of conspiracy contained in the indictment.

"Perry started cashing checks drawn by Hackbusch for which Hackbusch did not have sufficient funds on deposit, and used for that purpose money in the cash drawer of the bank."

Perry at first used his own funds to deposit money to Hackbusch's account so there would be sufficient funds to pay the checks drawn by Hackbusch. This was perfectly legitimate. Hackbusch was never advised that Perry was using money from the cash drawer of the bank, or otherwise, in order to deposit same to his account. It was incumbent upon the Government to show Hackbusch's knowledge of Perry's defalcation in order to sustain the charges of the indictment.

"Perry would hold the checks, and when Hackbusch's account had sufficient funds, Perry would charge as many checks as possible back into Hackbusch's legitimate account."

The evidence discloses that Hackbusch had no knowledge of any other account in said bank except his legitimate account. The evidence shows that Hackbusch had no knowledge of the various other accounts maintained by Perry. The methods pursued by Perry were unknown to Hackbusch, and Hackbusch had no reason to believe that Perry was defaulting at the bank. Perry testified that he carefully concealed this fact from Hackbusch. Perry also testified that he established these other accounts to enable him to keep track of how much money Hackbusch owed him.

"In September 1943, Perry opened the S. Hackran account in which he deposited money misapplied from the bank's funds."

The evidence conclusively shows that Hackbusch never had any knowledge or intimation of this account.

"Through that account, he cleared checks, bearing Hackbusch's signature, for which Hackbusch did not have sufficient funds in his regular account."

The evidence conclusively shows that Hackbusch did not have any knowledge that any of his checks were being cleared through any but his own legitimate account, and the evidence conclusively shows that Hackbusch did not have any knowledge other than that these funds were Perry's own personal funds.

"On January 22, 1944, Perry opened a special account in the name of Hackbusch, again using money misapplied from the funds of the bank."

There is no evidence that Hackbusch knew of this, nor is there any evidence upon which such an inference can be drawn.

"At the time he opened that account, he had 13 checks drawn by Hackbusch totalling $700."

This does not prove any allegation of the indictment touching upon conspiracy. Hackbusch had no knowledge of the existence of this account or its use, and there is no evidence from which such an inference can be drawn.

"Through that account, he cleared those and other checks drawn by Hackbusch."

The evidence shows that Hackbusch had no knowledge of this and there is no evidence which would support such an inference.

"According to the records of the bank, Hackbusch received, through Perry's cashing of his checks, $27,582.91 above the amounts deposited in his regular account."

The foregoing amount represents the amount of indebtedness from Hackbusch to Perry. There is not a single bit of evidence in this record that shows that Hackbusch had any knowledge that this sum represented any of the funds of the National City Bank, and there is no evidence which would support such an inference.

"Hackbusch received statements on his legitimate trustee account but received no statements of the accounts set up by Perry."

This is true, and supports the innocence of the petitioner.

"Perry would accumulate the checks he cleared and deliver them in batches to Hackbusch, totalling the amounts of those delivered on adding machine tape."

This statement is true but it fails to prove a single allegation of the indictment touching upon the subject of conspiracy. It is corroborative of the innocence of the accused, in his assertion that he was borrowing the money from Perry.

"Hackbusch never questioned Perry about the fact that the checks which he had drawn did not appear on his regular bank statements."

This statement does not support any inference of guilt on the part of the accused, but supports the asserted innocence of the petitioner that this transaction was, so far as Hackbusch was concerned, a personal loan from Perry.

"In a credit statement made by Hackbusch on May 23, 1944, he failed to list any indebtedness either to Perry or the bank."

He was not indebted to the bank. The mere fact that one does not list his entire indebtedness on a credit statement is not such a circumstance as to point unerringly to the guilt of the accused, and proves nothing other than the fact that he failed to disclose this indebtedness to Perry.

"Perry estimated that he had given Hackbusch between 40 and 50 thousand dollars of the bank's money."

This is Perry's testimony and shows conclusively that Hackbusch at least paid approximately $23,000 of the loan back to Perry, because the evidence shows that he only owed Perry $27,000. However, the evidence fails to disclose that Hackbusch knew this was the bank's money and there is no evidence to support such an inference.

"Hackbusch did not take the stand in his own behalf."

This was the constitutional right of the petitioner and did not relieve the Government of proving his guilt beyond all reasonable doubt, and such fact did not relieve the Government of meeting its burden of proving the guilt of the petitioner in such a manner as to exclude every other hypothesis but that of his guilt.

An analysis of the Government's summary of the evidence above referred to reveals that there is no evidence to support the conviction herein, and the Government in its said brief has failed to point out any evidence in the record which supports this conviction.

1.

The Conviction of Petitioner Is Not Supported by Any Evidence.

The majority written opinion in this cause is based upon the case of *Ray* v. *United States,* 114 Fed. 2d 508 (1940) (C.C.A. 8). The Government continues to rely upon this case. (See page 12 of Government's Brief.) Said case is not analogous to the facts presented by the record in the case at bar. An examination of the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Ray* v. *United States* will reveal that Judge Kerner and Judge Lindley, constituting the majority of the Circuit Court of Appeals for the Seventh Circuit in the instant case, have erroneously determined that this cause of action presents a parallel situation. This is not true and the affirmance of petitioner's conviction based upon the erroneous assumption that the Ray case is an authority herein demands a reversal of this cause upon the grant of certiorari. No criticism of the Ray case can be offered as applied to the facts therein involved, but the facts in this case are not analogous in any vital respect. The following statement from the opinion of the court in the Ray case will support the foregoing contention:

> "The defendant Schutte admitted her guilt in all respects and related in her testimony how for a period of many years appellant had overdrawn his account and how the deficit had increased with the years. She stated that she often throughout the period discussed the situation with him, that he promised to use the money from the sale of a mine, from his mother's estate and from other sources to repay the bank, but that he always failed to do so."

There is no evidence in the instant case that Perry ever discussed with Hackbusch any indebtedness to the National

City Bank on the part of Hackbusch or that the funds being placed at Hackbusch's disposal constituted funds of the National City Bank. The exact contrary is true. The uncontradicted evidence of the Government conclusively shows that it was Hackbusch's understanding that these funds were Perry's own personal funds. The uncontradicted evidence is that Hackbusch did not know of Perry's defalcation. In this case Hackbusch carefully concealed from Hackbusch any knowledge of his defalcation to the National City Bank, carefully concealed from Hackbusch the fact that he was securing these funds from sources other than his own money, and Perry testified that he made this concealment as a matter of pride. This evidence is uncontradicted and these facts make the instant case clearly distinguishable from the case of *Ray* v. *United States.* In the Ray case the court disposes of this issue by this statement:

> "In addition to the testimony of the defendant Schutte, the two accountants and the records of the bank, there was other corroborative evidence that made a prima facie case for the jury. The evidence offered by the government, if believed by the jury, was ample to prove guilt beyond a reasonable doubt."

A reading of the opinion in the Ray case does not reveal what this corroborative evidence was. However, in the instant case there is no evidence and, therefore, there was nothing to corroborate. The Ray case relied upon by the majority of the Circuit Court of Appeals in its written opinion herein is not authority for the affirmance of the judgment of the District Court in the case at bar.

Said case of *Ray* v. *United States* is further distinguishable for the reason that there was never an understanding between the defendant Schutte therein and the defendant Ray that the funds constituted a personal loan on the part of Schutte to Ray, whereas here the evidence shows that there was no understanding between Perry and Hackbusch

other than that the funds advanced to Hackbusch by Perry constituted a personal loan of Perry's own money. In the Ray case, Ray knew the money he was receiving from the defendant Schutte was not Schutte's money but money which belonged to a bank. The Ray case is distinguishable upon other grounds. The evidence there showed that Schutte and the appellant's wife were girlhood friends, a bridesmaid at appellant's wedding and godmother for their first baby. They lived next door to each other and were intimate friends for years. No such facts are shown in the instant case. In the Ray case the appellant was bound to have known the financial condition of Schutte, an employee of the bank and, in fact, did know that the funds there placed at his disposal were bank funds, as shown above. Here the defendant Hackbusch was not intimately acquainted with Perry, and their relationship was limited solely to business transactions. The evidence is silent as to any knowledge on the part of Hackbusch as to Perry's financial worth. Perry, a witness for the Government, did not testify that he had ever revealed to Hackbusch his financial worth; in fact, that was never discussed between Perry and Hackbusch. The petitioner herein feels that the absence of such a showing upon the part of the Government in the trial of this cause in the District Court constitutes a fatal weakness in the chain of circumstances which it was necessary that they develop in this cause to sustain a conviction. The evidence when carefully analyzed fails to reveal any proof to indicate that Hackbusch at any time had any reason to believe that the funds being placed at his disposal were funds of any other person than Perry. There is no evidence in this record that would permit the inference that Hackbusch knew that these funds were coming wrongfully from the National City Bank. The majority of the Circuit Court of Appeals in their written opinion herein, in discussing the Ray case stated

that she, Mary V. Schutte, testified that she pursued this course of conduct because of her friendship for Ray and his family, and that Ray was innocent. It is not suggested by the petitioner that Perry testified that the petitioner was innocent. The contention herein made by the petitioner is that Perry testified that Hackbusch had no part in or knowledge of his, Perry's defalcations, whereas in the Ray case the evidence showed conclusively that the appellant Ray knew the bank employee was misappropriating bank funds.

The Government's brief in opposition to petitioner's application for writ of certiorari herein refers to petitioner's attack on the standard of appellate review applied by the Circuit Court of Appeals. This petition presents a situation wherein the accused stands convicted without any evidence to support the verdict of the jury. In such an instance there is but one standard which should have been applied in the Circuit Court of Appeals, and that was to set aside the conviction. That is the standard to be applied here upon the presentation of this petition for writ of certiorari. This cause does not present an instance wherein the appellate court is asked to weigh the evidence. Relief is herein sought from a judgment of conviction wholly unsupported by any evidence. The law covering the rights of the accused is as applicable in an appellate court as in a trial court. In support of our contention we call the court's attention to the case of *Karn* v. *United States,* 158 Fed. 2d 568 (C.C.A. 9), which was an appeal from a conviction for larceny. In that case the Government relied entirely upon circumstantial evidence for a conviction, as did the Government in the instant case. We submit the following quotation from the opinion of the court in *Karn* v. *United States, supra:*

> "Viewing the evidence most favorable to the Government, we gather from the record the following facts:

The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt. 23 C.J.S. Criminal Law, 907, pp. 151, 152; *Paddock* v. *United States,* 9 Cir., 1935, 79 F. 2d 872, 876; *Ferris* v. *United States,* 9 Cir., 1930, 40 F. 2d 837, 840. Our considered judgment is that the evidence in this case falls far short of meeting this exacting standard.

"Nothing in the testimony indicates that appellant was aware of this fact. Hammond testified that of the missing $1079, one-half was in silver coin. This being the case, the jury had before it the fact that when taken into custody appellant had on his person a sum of paper money amounting to something over one-half of the total amount of paper money claimed to be missing. It is true that the money found on him could have been part of the stolen currency. But so far as the record shows, it is equally true that it could have been part of the money he had borrowed from Gilbertson. Whatever doubt or uncertainty resides in this situation was not eliminated by the testimony of witnesses for the prosecution.

"The only attempt made by the prosecution to directly link the money found in appellant's possession at the time of his arrest with the money stolen from the Chena Bar, was by the testimony of witness Hill. His attempted identification of the soiled ten dollar bill found in the possession of appellant as one that was in the cash register of the Chena Bar on the night of the theft was so vague and unsatisfactory as to create a reasonable doubt that the said bill was a part of this Chena Bar money. The bill was soiled, but so much may be said of a lot of paper money.

"It is true that actual possession of stolen property may be shown, but it is equally true that the prosecu-

tion must also prove, beyond a reasonable doubt, that the property found in possession of the accused is, in truth and in fact, the identical property which was stolen. A bare assertion that property in the hands of accused is 'similar property' or property that 'looks like it,' is not sufficient to establish such property as the stolen property.

"The burden is not on a defendant in a criminal case to prove his innocence since the burden rests upon the prosecution to establish every element of the crime with which he is charged, to a moral certainty and beyond reasonable doubt."

The standard which the petitioner sought to have the Circuit Court of Appeals apply and the standard which petitioner now seeks the Supreme Court of the United States to apply is that a conviction must be supported by competent evidence, not based solely on suspicion, guess or conjecture. A conviction not so supported by the evidence is not obtained by due process of law.

2.

Judge Walter C. Lindley Was Disqualified to Act as Judge of the Circuit Court of Appeals.

The Government answers Petitioner's attack on the disqualification of Judge Walter C. Lindley to hear this cause on appeal to the Circuit Court of Appeals for the Seventh Circuit with the mere statement:

"There is no merit in this contention. Judge Lindley did not act in the district court on any question concerning petitioners' guilt. Perry's defalcations were not disputed in either case and were not in issue on petitioners' appeals."

Government's Brief, page 14.

This is not a sufficient answer to the contention made by

the Petitioner. The disqualification of Judge Lindley is not to be determined by Perry's admitted guilt. What controls this situation is the fact that Judge Lindley was confronted as Judge of the United States District Court in the Perry case with *"questions"* that were also involved in this the Hackbusch case on appeal to the Circuit Court of Appeals. Reference to the indictment against Perry set out as Exhibit I to the petition for writ of certiorari herein, pages 27-44 thereof, convincingly supports Petitioner's assertions of the disqualification of Judge Lindley. Reduced to a simple proposition, underlying our whole judicial structure is the guarantee to every accused of a fair trial before an impartial and unbiased judiciary. Such consideration motivated the passage of the statute to which reference has been made herein and which is controlling, Section 120 of the Judicial Code as Amended, Title 28, Section 216, U.S.C.A. The right of appeal to the Circuit Court of Appeals necessarily carries with it the implication that the cause will be given a fresh, new consideration, unencumbered and unhampered by previously fixed opinions and convictions of the judges.

> "* * * A federal statute provides that no judge before whom a cause or question may have been tried or heard in a Federal District or existing Circuit Court shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."
>
> 30 Am. Jur. page 790, Sec. 83.

The above quotation from the text of the foregoing work is supported by this comment in the note thereunder:

> "The purpose and intention of Congress in enacting this provision manifestly was to require the Circuit Court of Appeals to be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of the first instance."

The above work makes the following additional comment:

"The provision of the Federal statute above referred to disqualifies a judge who has once heard a cause upon its merits in the court of first instance from sitting in the court of appeals on the hearing and decision of any question, in the same cause, *which involves in any degree matter upon which he had occasion to pass in the lower court.* The disqualification arises not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the upper court to consider and pass on. That the question may be easy of solution, or that the parties consent to the judge's participation in its decision, can make no difference. The disqualification applies also to a trial judge who did not, in substance, form or express an opinion on the case in the first instance, but merely entered a pro forma decree to enable the case to be heard for the first time by the reviewing court. A district judge who heard and denied a motion to remand the cause to the state court whence it had been removed is disqualified to sit in the Circuit Court of Appeals upon the hearing of an appeal from the final decree of the Circuit Court in such case."

Under no consideration of this case was it proper for Judge Lindley to hear and determine this cause as a Judge of the Circuit Court of Appeals. The fact that he did sit and cast the determining vote for an affirmance herein, when the two regular judges of the Circuit Court of Appeals divided, Judge Kerner for affirmance and Sparks, Chief Judge, dissenting for reversal, now constitutes the compelling reason for the grant of certiorari herein as prayed.

3.

The Trial Court Coerced the Jury.

Here we have an instance where the trial court tells a body of laymen, which was the jury, that their failure to agree would amount to stalemating the court so that they can't make any progress. This is as near coercion of a jury to reach a verdict as could possibly be expressed. It amounted to telling the jury that they must agree, and the only stronger way it could be expressed was to tell the jury to go back in the jury room and agree. This constituted a coercion of the jury that requires a reversal of this cause. The position here in no manner is analogous to "It is well established that a trial judge in his discretion may urge a jury which has reported disagreement to deliberate further in an endeavor to reach a verdict." The court in the instant case told the jury in effect that they must agree, and the jury had a right to conclude that if they did not agree under the instructions and statement that they were stalemating the progress of the court, and that it was their duty to go back to the jury room and agree.

Respectfully submitted,

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